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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-419

PITTSBURGH PRESS COMPANY,

Petitioner

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH AND THE NATIONAL ORGANIZATION FOR WOMEN, INC.,

Respondents

AMICUS CURIAE BRIEF IN SUPPORT OF AFFIRMANCE

LOWER COURT OPINIONS

The opinion of the Pittsburgh Human Relations Commission is unreported. The opinion of the Court of Common Pleas of Allegheny County is unofficially reported in 3 EPD ¶ 8154 (CCH Publication, "Employment Practice Decisions", cited hereinafter as EPD).

The opinion of the Commonwealth Court of Pennsylvania is reported at 4 Commonwealth Court 448, 287 A.2d 161 (1972).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). The Pennsylvania Supreme Court denied review on June 21, 1972. Certiorari was granted by this court on December 4, 1972. —— U.S. ——, 93 S. Ct. 515 (1972).

QUESTION PRESENTED

Does an ordinance which has the effect of prohibiting the printing of sex discriminatory help-wanted advertisements by a newspaper violate freedom of the press?

AMICUS CURIAE AUTHORITY

The International Association of Official Human Rights Agencies files a brief *amicus curiae* in these proceedings pursuant to Rule 42(2) of the Rules of the Supreme Court of the United States. The Association has obtained the consent of respondents but has not obtained the consent of petitioner to file a brief *amicus curiae*.

INTEREST OF AMICUS CURIAE

The International Association of Official Human Rights Agencies (IAOHRA) is an umbrella organization consisting of state and local civil rights agencies throughout the country. Included in IAOHRA's active membership are the following contributing agencies: State of Alaska Commission for Human Rights, Connecticut Commission on Human Rights and Opportunities, Iowa Civil Rights Commission, Kentucky Commission on Human Rights, Massachusetts Commission Against Discrimination, Michigan Commission on Civil Rights, State of Maryland Commission on Human Relations, and the State of Nebraska Equal Opportunity Commission. All of the foregoing agen-

cies are charged with protecting and advancing the cause of human rights including enforcement responsibilities for state civil rights laws dealing with such matters as employment, housing and public accommodations. These agencies are similar in function, if not identical, to the Pittsburgh Commission on Human Relations. The issues raised in these proceedings involve whether or not a newspaper may encourage constitutionally and statutorily forbidden discrimination. Also, significant questions are raised as to the extent to which states and localities may attempt to end discrimination by attacking not only those who discriminate but those who make discrimination possible. Reversal of the decision below could result in advertising which promotes sex and race distinctions affecting the enforcement responsibilities of state and local civil rights agencies.

STATUTES INVOLVED

Pittsburgh Human Relations Ordinance No. 75 (1967) as amended by Ordinance No. 395 (1969) which provides *inter alia*

Section 8

* * *

It shall be an unlawful employment practice . . . except where based upon a bona fide occupational exemption certified by the Commission in accordance with Section 7, subsection (d) of this ordinance: . . .

(j) for any person, whether or not an employer, employment agency or labor organization, to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, or to obstruct or prevent any person from enforcing or complying with the provisions of this ordinance, or any rule, reg-

ulation or order of the Commission, or to attempt directly or indirectly to commit any act declared by this ordinance to be an unlawful employment practice.

STATEMENT

This Amicus adopts the statement set forth in the brief of Petitioner.

ARGUMENT

Regulation of Those Who Aid Employment Discrimination on the Basis of Sex Is Constitutionally Permissible.

Arbitrary classification of the sexes has been declared unconstitutional by this court and is prohibited by statute.

The language of *Reed* v. *Reed*, 404 U.S. 71 (1971), is clear:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context *may not lawfully be mandated solely on the basis of sex*. *Id.* at 77 [Emphasis supplied].

This constitutional mandate runs to both sexes. To require a male to cut his hair for reasons of sanitation, safety or uniformity, and then to fail to apply that regulation to females imposes unreasonable and oppressive standards on males. *Griffin* v. *Tatum*, 425 F.2d 201 (5th Cir. 1970).

In the employment field, discrimination based on sex is subject to further limitations by statute.

Title VII of the *Civil Rights Act of 1964*, 42 U.S.C. 2000e (1970), as interpreted in the Equal Employment Opportunity Commission Guidelines on Sex Discrimination, has declared that sex discrimination in the employment recruitment field is unlawful.

The purpose of the inclusion of the prohibition against sex discrimination in the Act is not only to achieve the optimum use of our labor force, but to enable individuals to be judged independent of their sex. *Diaz* v. *Pan American World Airways*, 442 F.2d 385 (5th Cir. 1971), *Sub nom* 404 U.S. 950 (1971).

Sex discrimination becomes manifest when a whole class is relegated to an inferior status when it is denied privileges or deprived of opportunities without regard to the characteristics or capabilities of its individual members. The mandate of the courts is to eliminate the use of outdated stereotyped classifications by employers. *Sail'er Inn, Inc.* v. *Kirby*, 95 Cal. Rptr. 329, 485 P.2d 529 (1971).

Petitioner incorrectly argues that employment patterns in this country generally reflect job interest and qualifications along sex lines but not along racial or nationality lines. Employment patterns clearly manifest that females are concentrated in lower paying jobs and if not virtually excluded are grossly underrepresented in sales, professional, and managerial positions in comparison to white males. The Senate Labor and Public Welfare Committee has found that

> . . . while Title VII has been on the statute books for over 5 years, its proscription of sex discrimination continues to be widely regarded as a kind of legislative accident. . . . [*W*]*omen's rights are not a laughing matter* . . . [T]he administration and . . . [Civil Rights Agencies are urged] to util-

> ize the enforcement mechanisms and expanded coverage of this bill to dispel any lingering doubts that the federal government is aware of, and fully responsive to, the need to end sex discrimination with the same dedication expected in ending discrimination because of race, color, religion or national origin. S. Rep. No. 91-1131, 91st Cong., 2d Sess., pp. 5-6 (1970). [Emphasis supplied]

It is clear that Congress intended to prevent employers from refusing "to hire an individual based on stereotyped characterizations of the sexes." Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex, 29 CFR Section 1604.1(a)(1)(iii). See *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969). Whether a woman cabin attendant is married, *Spregis* v. *United Air Lines*, 444 F.2d 1194 (7th Cir. 1971) *cert. den.* 404 U.S. 999 (1971), or a woman factory employee has pre-school age children, *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971), or whether a cabin attendant is male or female, *Diaz* v. *Pan American World Airways, supra,* is irrelevant to the jobs in question because there is no demonstrated correlation between job performance and the sex of the applicant or employee.

Thus, when the Pittsburgh Commission on Human Relations found under the City Fair Employment Practices Law that more attractive employment opportunities consistently appeared in the male classification, this laid a basis upon which the Commission could find a discriminatory recruiting practice which was aided and promoted by the Petitioner. Of course that administrative interpretation by any agency enforcing a civil rights law as well as the Pennsylvania Commission's guidelines on sex discrimination noted by the lower

court are entitled great weight. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Trafficante* v. *Metropolitan Life Insurance Co.*, —— U.S. ——, 41 U.S.L.W. 4071 (1972); *Udall* v. *Tallman*, 380 U.S. 1 (1970); *Phillips* v. *Martin Marietta Corp., supra.*

In *Griggs* v. *Duke Power Co.*, 404 U.S. 424 (1971), this Court held a showing of business necessity may relieve an employer of strict compliance with equal employment opportunity obligations. The business necessity test has been narrowly construed in *Diaz* v. *Pan American World Airways, supra.* Necessity connotes an irresistible demand. *U.S.* v. *Bethlehem Steel Corp.*, 444 F.2d 652 (2nd Cir. 1971). Even economic hardship is not sufficient business necessity to justify the discriminatory employment practice. *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971).

The Federal, State, and local Fair Employment Practices Laws all contain a bona fide occupational qualification (BFOQ) exception for sex, religion or national origin which also may relieve an employer of strict compliance with equal employment opportunity laws. However, the BFOQ exception has been given a limited construction by the federal courts to prevent the exception from emasculating the general rule prohibiting discrimination in employment on account of sex. *Ridinger* v. *General Motors Corp.*, 325 F. Supp. 1089 (S.D. Ohio 1971); *Phillips* v. *Martin Marietta Corp., supra.* The only exception is the situation where unique physical attributes of one sex or the other are essential to the performance of the job in question, *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971). It is clear from the Commission's Order and the lower court decision that Petitioner will suffer no liability under the BFOQ exception and the evi-

dence of record shows no relationship to the exception. Therefore, the exception has no applicability to the instant case.

At the same time customer preference has been held not to be sufficient justification to validate otherwise unlawful employment practices. *Doe* v. *Osteopathic Hospital of Wichita, Inc.*, 333 F. Supp. 1357 (D. Kan. 1971); *Diaz* v. *Pan American World Airways, supra.* Despite Petitioner's argument to the contrary, customer or reader preference regarding sex is not a BFOQ and does not satisfy the test of business necessity.

By its use of disclaimer paragraphs at the beginning of the classified section, Petitioner expressly concedes that sex designated columns can lead readers to conclude that employers are expressing a sex preference by their manner of advertising an opportunity which would not exist if the newspapers did not provide separate columns. *Hailes* v. *United Air Lines,* 464 F.2d 1006 (5th Cir. 1972). The disclaimer, while attempting to mitigate the impact of the separate columns, does not eliminate the effect on the reader that employers are using the arrangement to indicate that some jobs are more suitable for one sex than another. Such disclaimer does not neutralize the sex segregated want-ad. *Hailes* v. *United Air Lines, supra.* It is just as illegal to advertise with sex designated headings as it is to do so with other headings such as religious, racial or nationality designations. *United States* v. *Hunter*, 459 F.2d 205 (4th Cir. 1972), *cert. denied* —— U.S. —— 93 S. Ct. 235 (1972).

Title VII Courts have taken a restrictive view regarding the regulations of a newspaper's conduct in

aiding and promoting sex discrimination in employment recruitment. *Brush* v. *San Francisco Newspaper Printing Co.*, 315 F. Supp. 577 (N.D. Calif. 1970), *aff'd* —— F.2d —— (9th Cir. 1972), *Cert. filed* Docket No. 72-880; *Greenfield* v. *Field Enterprises, Inc.*, —— F. Supp. —— (N.D. Ill. 1972) 4 EPD 7763; *but see, American Newspaper Publishers Assoc.* v. *Alexander*, 294 F. Supp. 1100 (D.C.D.C. 1968); *aff'd in part, vacated in part* —— F.2d —— (C.A. D.C. 1969), 1 EPD 9460; *Morrow* v. *Mississippi Publishers Corp.*, —— F. Supp. —— (S.D. Miss. 1972), 5 EPD ¶ 8415.

Regardless of the Title VII holdings, the Pittsburgh Ordinance as well as many other state and local civil rights laws have *extended* the government's ability to regulate sex discrimination to include the activities of newspapers among those who *aid and promote* discriminatory recruiting practices. The record below clearly indicates that Petitioner did aid and promote unlawful sex discrimination in violation of the local ordinance. The only remaining question is whether the Commission's Order is constitutionally permissible.

Sex designated column headings are not constitutionally protected when violative of civil rights laws. The headings are so closely related to the classified advertisements that they cannot be separated from the purely commercial nature of that advertising. In a case involving prohibition of discriminatory real estate advertising by a newspaper the fourth circuit ruled advertising for a commercial purpose is subject to regulation by the state. *United States* v. *Hunter*, 495 F.2d 205 (4th Cir. 1972), *cert. denied* —— U.S. ——, 41 U.S.L.W. 320 P. 1972). In *Hunter*, the court cited an unbroken line of authority to support the distinc-

tion between communication of ideas and purely commercial material.[1]

Hunter should be dispositive on the issue of First Amendment coverage. The decision upheld the validity of the *Civil Rights Act of 1968*, 42 U.S.C. § 3604(c), which prohibits newspapers from publishing discriminatory housing advertisements. The Court distinguished between the expression of ideas protected by the First Amendment and commercial advertising in a business context:

> It is now well settled that, while freedom of communicating information and disseminating opinion enjoys the fullest protection of the First Amendment, the Constitution imposes no such restraint on government as respects purely commercial advertising. Citing *Valentine* v. *Chresensen*, 316 U.S. 52, 54 (1942).

Employment and real estate advertisements are printed by newspapers as a profit-making activity. It does not require a broad reading of *Valentine* to find that the column headings are commercial in nature, not editorial. The whole purpose of column headings is to project a commercial message. The headings direct the reader to what follows.

While the sex designations reflect the opinions of the editors, they are opinions as to the way of maximizing revenue from the classified advertisements by facilitating reader response in a manner which will please

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[1] *Bread* v. *City of Alexandria*, 341 U.S. 622, 641-645 (1951); *New York State Broadcasters Ass'n, Inc.* v. *United States*, 414 F.2d 990, 998-99 (2nd Cir. 1969), *cert. denied* 396 U.S. 1061 (1970); *Banzhaf* v. *FCC*, 405 F.2d 1082, 1099-1103 (D.C. Cir. 1968) *cert. denied, sub nom.; Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (D.D.C. 1971).

employers. In *Valentine* the Court rejected an attempt to save a commercial handbill from proscription by printing some political material on the reverse side. The Petitioner in the instant case should not be allowed to avoid the anti-discrimination law by claiming a separation of the classified headings from the body of the advertisements. They are not functionally separable.

> Professor Emerson defines the 'commercial sector' as 'roughly' embracing the production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic and similar matters. *United States* v. *Hunter, supra,* n. 6.

New York Times v. *Sullivan,* 376 U.S. 254 (1964) and the instant case are easily distinguishable because the classified section does not communicate ideas for a non-commercial purpose.

The Pittsburgh Ordinance does not put an undue burden on newspapers. All that is demanded of Petitioner in this case is the elimination of separate sex designated columns for employment. Thus, the protection given newspapers in *New York Times* v. *Sullivan, supra,* is not applicable to the facts of this case. There is no chilling effect on the paper's news reporting and editorial policy. The newspaper is free to have separate sports and women's sections if the editors so desire. Employers are free to place their advertisements in whatever kind of publication they choose as long as sex preferences are not indicated within the advertisement and the total effect of all recruitment techniques is not sex discrimination in hiring. As for the duty to screen employment advertising before publication, the only burden on the news-

paper is to eliminate those advertisements which on their face clearly show a discriminatory preference. In those instances where an employer claims that sex is a BFOQ the newspaper can accept in good faith a declaration from the advertiser to the validity of this claim. There is no duty put on the newspaper to investigate the actual practices or intent of employers.

Lastly, Petitioner argues a distinction between sex and the other protected classes set forth in the Pittsburgh Ordinance. This contention is utterly without support. *Reed* v. *Reed, supra.* Nothing in the Ordinance suggests such an arbitrary classification. While the policy for prohibiting sex discrimination may have been based upon different economic and social reasons than those that existed for race, religion and national origin, the Ordinance provides no variation in the rights and remedies afforded each protected class. The finding of the trial court is clear that sex is to be afforded the same protection as race and the other designations. *Appeal of Pittsburgh Press Co.*, 3 EPD 8154 at p. 6493.

If jobs can be categorized as of male or female interest there is nothing to stop newspapers from designating column headings as "Catholic Jobs" or "Italian Jobs" or from heading a real estate column "White Suburban Interest."

CONCLUSION

As shown herein, Petitioners have no constitutional defense for conduct which aids and promotes discrimination on the basis of sex. Accordingly, for the reasons stated, the judgment below should be affirmed.

Respectfully submitted,

State of Alaska Commission on Human Relations

Connecticut Commission on Human Rights and Opportunities

Iowa Civil Rights Commission

Kentucky Commission on Human Rights

State of Maryland Commission on Human Relations

Massachusetts Commission Against Discrimination

Michigan Commission on Civil Rights

State of Nebraska Equal Opportunity Commission

PHILIP J. TIERNEY
268 New Mark Esplanade
Rockville, Maryland 20850

ELIZABETH HOLST TOCKMAN
233 W. Lafayette Ave.
Baltimore, Md. 21217

Counsel for
International Association of Official Human Rights Agencies
1625 K Street, N.W.
Suite 102
Washington, D.C. 20006

February, 1973